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## **Must Attorney Fees Be Superseded on Appeal?**

November 7, 2011 by D. Todd Smith

A split is developing among the intermediate Texas appellate courts on an issue important to civil trial lawyers and their clients: whether attorney fees must be included in the amount of security a judgment debtor must post to prevent execution on the judgment pending appeal.

Under former Texas Rule of Appellate Procedure 24.2(a)(1), an appellant seeking to supersede a money judgment had to post security in “at least the amount of the judgment, interest for the estimated duration of the appeal, and costs.” House Bill 4, the 2003 tort-reform package, altered the amount of security required to supersede a money judgment by substituting “the amount of *compensatory damages* awarded in the judgment” for “the amount of the judgment.” The Texas Supreme Court amended Rule 24.2 accordingly.

Under the old rule, “the amount of the judgment” included not only actual or compensatory damages, but also any punitive or additional damages authorized by law. Most everyone agreed that HB4 removed these sorts of “noncompensatory” damages from what must be secured, making it easier for defendants to suspend money judgments on appeal. But questions arose about whether a judgment debtor needs to supersede attorney fees and other matters making up “the amount of the judgment,” yet arguably outside HB4’s “compensatory damages” standard. The fee issue is finally making it way up to the appellate courts.

Two decisions illustrate the emerging split. In *Shook v. Walden*, 304 S.W.3d 910 (Tex. App.—Austin 2010, order), the Third Court of Appeals relied on certain definitions that HB4 added to a different part of the CPRC to conclude that “compensatory damages” did not include attorney fees. In *Fairways Offshore Exploration, Inc. v. Patterson Services, Inc.*, \_\_\_ S.W.3d \_\_\_, 2011 WL 2925910 (Tex. App.—Houston [1st Dist.] July 21, 2011, order), the First Court of Appeals declined to follow *Shook*, holding instead that attorney fees are “compensatory damages awarded in the judgment” that must be secured to suspend enforcement of a judgment pending appeal.

This topic is too complex to treat in depth here. For one thing, *Shook* has some nuances that might be read as imposing something less than an absolute rule excluding attorney fees from what must be superseded. I intend to write more about this issue

and may put together a CLE presentation on it. In the meantime, practitioners on both sides of the docket need to be aware of the *Shook-Fairways* split and consider it in formulating postjudgment strategy.